STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2005
v	No. 253397 Saginaw Circuit Court
MONTY NOEL CAZIER, Defendant-Appellee.	LC No. 99-018096-FH

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for resisting and obstructing a police officer, MCL 750.479, and assault and battery, MCL 750.81. Defendant argues that there was insufficient evidence to convict him of the crimes charged, and that he was denied his right of due process and right to a fair trial. Because we are not convinced by any of defendant's arguments, we affirm.

This case arose out of an incident that occurred at the Boardwalk branch of the United States Post Office in Saginaw on September 27, 1999. On that date, defendant, who runs a mail order business, arrived at the post office at approximately 4:45 pm with a total of 66 items to be mailed. While at the counter, defendant removed some of his packages from mail baskets and the mail clerk weighed a few of the items. Assuming all of the packages were the same weight, the mail clerk presented stamps to defendant instructing him to affix the postage himself. Defendant explained that all of the parcels were not the same weight and requested all of the items be metered. The mail clerk then processed more of the packages. But after processing a total of ten packages, the mail clerk asked defendant to step aside from the counter explaining she could not process more than ten items of the same weight due to an internal policy.

Defendant then asked the clerk to see the policy, and the clerk referred defendant to the branch manager, Darryl Steiner. When Steiner arrived at the counter, he recognized defendant who he had informed of the internal policy on a previous occasion. Steiner reminded defendant that the policy regarding the metering of multiple envelopes was not a written one, but rather an operating procedure Steiner had developed. Steiner then asked defendant to step to the back of the line to allow other customers to be serviced. Defendant refused and asked that the clerk meter his pieces of mail. Steiner once again asked defendant to step to the end of the line and defendant again refused.

Steiner stated he was going to call the police if defendant did not leave the counter. Steiner returned to his office, waited a few minutes to see if defendant would leave, but he did not. Steiner then called the police and requested an officer to escort defendant out of the post office. During this time, defendant picked up a pen and began writing a note to the postmaster requesting the regulations on the number of pieces of mail that could be mailed at one time.

When Officer Toft arrived, Steiner pointed out defendant. Toft asked defendant to step away from the counter to discuss the issue. Defendant refused and continued writing. Toft approached defendant believing defendant had the pen raised in an aggressive manner, attempted to remove the pen from his hand, and after pulling defendant's arm behind his back, began to restrain defendant and physically remove him from the post office branch with the help of Trooper Alan Renz who had also entered the post office by that time. After the police officers had defendant in an armlock, defendant's body went rigid and all three were on the floor at one point. When defendant did not relax and comply with their repeated orders, Toft sprayed him with pepper spray. The officers then escorted defendant out of the post office and placed him in the police cruiser. Toft testified at trial that while he was placing defendant into the police car, his hand went down and defendant bit his right index finger.

Defendant first argues that there was insufficient evidence to convict him of resisting and obstructing a police officer where the only evidence was that defendant declined the officer's request to move away from the post office counter. We review challenges to the sufficiency of the evidence in a criminal trial de novo, viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). A trier of fact may make reasonable inferences from direct or circumstantial evidence in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

The elements of resisting and obstructing a police officer are: (1) the conduct alleged obstructed, resisted, or opposed (2) a police officer (3) in his prescribed duties, and (4) the conduct was done knowingly and willfully. MCL 750.479(1). To do an act knowingly and willfully means that the defendant intended to do the act to a police officer and did so knowing the person was a police officer. *People v Gleisner*, 115 Mich App 196, 198-199; 320 NW2d 340 (1982). The offense requires that a defendant oppose a police officer by actual physical interference or by expressed or implied threats of physical interference. *People v Vasquez*, 465 Mich 83, 99-100, 114-115; 631 NW2d 711 (2001).

Defendant argues that the evidence was insufficient to support his conviction because the prosecution did not prove that he intended to resist arrest when all defendant did was refuse to move away from the post office counter. Resisting arrest and resisting and obstructing a police officer are different crimes. *People v Rice*, 192 Mich App 240, 243; 481 NW2d 10 (1991). The lawfulness of an arrest is an element of the former offense, but is not an element of the latter offense. *People v Green*, 260 Mich App 392, 401-402; 677 NW2d 363 (2004). A conviction of resisting and obstructing a police officer may be sustained if the evidence showed that the defendant obstructed an officer in the discharge of his duties. *Id*. at 401. The jury was entitled to accept the officers' testimony that defendant did not follow the officers' repeated commands,

made an aggressive motion with a pen, physically resisted being taken out of the post office requiring the use of a chemical spray, and bit one of the officers as the officer placed defendant in the police cruiser. The jury was entitled to infer from this evidence that defendant acted intentionally and with knowledge that the officers were police officers. *Milstead, supra*; *Gleisner, supra*; *Vaughn, supra*. The evidence presented here, viewed in the light most favorable to the prosecution, was sufficient to support defendant's conviction of resisting and obstructing a police officer. *Wolfe, supra*.

Defendant next argues that he was denied his state and federal constitutional rights to due process and a fair trial because of the substantial possibility that the jury convicted him of a crime not charged. Essentially, defendant argues that the jury instruction given did not accurately reflect the elements of resisting and obstructing a police officer, MCL 750.479, causing a discrepancy between the charge and the proofs resulting in a clear due process violation. Because defendant failed to raise this instructional claim below, this Court reviews this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"We review jury instructions in their entirety to determine if error requiring reversal occurred." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "The instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence." *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Aldrich, supra*.

Here, the trial court instructed the jury in accordance with CJI2d 13.2 Interference with an Officer Maintaining the Peace, and stated as follows:

> First, that the defendant resist an officer of the law. The defendant must have actually resisted by what he said or did, but physical violence is not necessary.
>
> Second, that the person the defendant resisted was then a Saginaw Township Police officer or Michigan State Police trooper.
>
> Third, that the defendant knew then that the person was an officer of the law.
>
> Fourth, that the officer was then carrying out lawful duties.
>
> Fifth, that the defendant knew that the officer was doing so,
>
> Sixth, that the defendant intended to resist the officer.
>
> Seventh, that the words or action of the defendant, in fact, interfered with the officer in carrying out those duties.

Viewed in their entirety, the instructions clearly expressed that the prosecution must prove all of the elements of resisting and obstructing a police officer pursuant to MCL 750.479(1) in order for defendant to be convicted of the charged crime. Contrary to defendant's argument, a reading

of the instructions demonstrates that the instructions properly included all the elements of resisting and obstructing a police officer and did not exclude any material issues, defenses, or theories that were supported by the evidence. *Marion, supra*, 250 Mich App 448. Because the instructions fairly presented the issues and protected defendant's rights, reversal is not warranted. *Aldrich, supra*, 246 Mich App 124.

Defendant also argues that his conviction for assault and battery must be reversed because the prosecution failed to present sufficient evidence to satisfy the elements of the crime charged. Again, we review challenges to the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Wolfe, supra*, 440 Mich 514-515; *Milstead, supra*, 250 Mich App 404.

An assault "'is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004), quoting *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979), quoting *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978). "'[A] battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.'" *Nickens, supra*, at 628, quoting *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998).

The crux of defendant's argument is that there was no evidence defendant was able to see at the time of the battery because moments before the battery, the police officers had used pepper spray on defendant. At trial there was testimony that the use of pepper spray causes pain and disables a person. Defendant testified that his eyes were watering, they burned when he tried to open them, and that his eyes were swollen shut and that he could not see what was in his mouth at the time he bit down.

After reviewing the evidence in the light most favorable to the prosecutor, we conclude that a rational trier of fact could have concluded that defendant committed an assault and battery beyond a reasonable doubt under the factual scenario presented. Defendant does not deny that he felt something in his mouth and that he did bite down on it. The circumstances surrounding the biting, certainly including the fact that defendant was temporarily blinded and might not have been able to see what was entering his mouth, were important factors for the jury to consider when weighing the evidence. However, it is not our province to interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Wolfe, supra*, 440 Mich 514-515; *Milstead, supra*, 250 Mich App 404.

Finally, defendant argues that the trial court abused its discretion when it admitted other similar act evidence contrary to MRE 404(b) where there was no proper purpose offered, no logical relevance, the act was not similar, and the evidence was more prejudicial than probative. We review the trial court's decision to admit evidence of other acts for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made." *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001).

"Under MRE 404(b)(1), '[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.' However, such evidence may be used to prove something other than the defendant's propensity to commit a particular crime." *People v Drohan*, 264 Mich App 77, ___; ___ NW2d ___ (2004). "Proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . " are possible allowable uses pursuant to MRE 404(b)(1).

To be admissible under MRE 404(b), other-acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). The factors a court must consider when analyzing evidence under MRE 404(b) are as follows:

> 'First, the prosecutor must offer the other acts evidence for a permissible purpose, i.e., to show something other than the defendant's propensity to commit the charged crime. [*People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).] Second, the evidence must be relevant to an issue or fact of consequence at trial. *Id*. Third, the trial court must determine whether the evidence is inadmissible under MRE 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *VanderVliet, supra* at 74-75. Additionally, the trial court, on request, may instruct the jury on the limited use of the evidence. *Id*. at 75.' [*Drohan, supra*, 264 Mich App ___, quoting *Watson, supra* at 577.]

Defendant specifically argues that the trial court erred when it ruled, over defense objection, that the prosecutor could introduce particular similar act evidence under MRE 404(b). The act involved an incident where defendant allegedly resisted arrest when he was taken into custody on a bench warrant after he appeared in court for an adjournment in the instant case. At a motion on the matter, the prosecutor argued that the evidence was admissible to show that defendant acted purposefully regarding the resisting and obstructing charge and to display intent and/or lack of accident regarding the assault charge. Defense counsel countered that the similar act had no relevance to the charges. The trial court held that the similar act evidence was admissible to show both intent and motive and granted the prosecutor's motion.

It was defendant's theory of the case that he did not resist or obstruct the police when he merely declined the officer's request to move away from the post office counter. Also, defendant also issued a general denial regarding the assault and battery charges, asserting that he could not see what was in his mouth due to the officer's application of pepper spray. Both of these assertions go to lack of intent or motive to commit the charged crimes. This was a proper purpose, and therefore, the trial court correctly admitted the similar act evidence as proof of defendant's intent and motive. Further, considering defendant's theory of the case, and the record before us, we conclude that the evidence was logically relevant to the charges, and not

more prejudicial than probative.

Affirmed.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio